Supreme Court, U.S.
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No. 92-1616

In The

# Supreme Court of the United States

October Term, 1992

LOCAL 32B-32J, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN OPPOSITION

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## DISCLOSURE OF INTERESTED PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court, Rachel Bridge Corp. has no parent companies, affiliates or subsidiaries that have issued shares to the public. Field Bridge Associates is a real estate partnership that has no parent companies or subsidiaries.

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## SUMMARY OF ARGUMENT

1. The NLRB's requirement that that assumption of a collective bargaining agreement by conduct be established by clear and convincing evidence is consistent with the Supreme Court's decision in *NLRB v. Burns Int'l. Sec. Servs.*, 406 U.S. 272 (1972) and Section 10(c) of the National Labor Relations Act.

2. Collateral estoppel was inapplicable in the instant case because the state court decision resolved a different issue from that resolved by the National Labor Relations Board.

## POINT I

## RESPONDENTS DID NOT ADOPT ANY UNION AGREEMENT BY THEIR CONDUCT.

Petitioner contends that Respondents adopted the RAB Agreement through their conduct after acquiring the property. Even assuming that Respondents were "successor employers" within the meaning of *NLRB v. Burns Int'l. Sec. Servs.*, 406 U.S. 272 (1972) and its progeny, and thus obligated to recognize and bargain with the Union, they were not bound by any specific labor contract absent a clear and unequivocal intention to be so bound.[1] 406 U.S. at 294-95. The burden of proving an intent to adopt

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[1] It has always been the position of Respondents that they are *not* successors since the unit in the RAB Agreement was inappropriate. Petitioner's assertion in footnote 5 is factually incorrect.

the RAB Agreement is on the party asserting that position. The facts herein in support of adoption were ambiguous at best, and hence did not warrant such a finding.

The record established that the union dues improperly deducted by Field Bridge were never transmitted to the Union and were returned to each employee, with interest. The claim of promised medical benefits, also relied upon by the Union, also did not evince an intent to be bound by the RAB Agreement. The fact that Field Bridge promised an employee medical coverage did not mean it would be the medical coverage under the RAB Agreement. Significantly, Field Bridge did not make any payments to the Union's Health and Welfare Fund.

Rachel Bridge's post-transfer conduct also did not constitute an adoption of the RAB Agreement. The Union focused upon two checks drawn on Rachel Bridge's account by Arco for the Union Health and Welfare and Pension Funds. However, both checks were inadvertently issued based upon unauthorized signatures of two officers of Arco. This was done in direct violation of a corporate resolution filed with the bank, which error was acknowledged by it and which credited Rachel Bridge's account in full. No agreement was made to assume Arco's contract with the Union when Rachel Bridge subsequently terminated Arco's managing services.

The inadvertent deduction of union dues does not establish an adoption of a contract. Local 32B-32J. *SEIU v. Sage Realty Corp.*, 524 F.2d 601, 603 (2d Cir. 1975). Furthermore, the mere continuation of economic benefits prevailing at the time of takeover, without more, does not

establish an adoption of the contract. *All State Factors,* 205 NLRB 1122 (1973). *Id.* at 1127.

Significantly herein, Respondents did not adhere to the vast majority of contractual provisions as evidenced by the instant proceeding and arbitrations alleging a failure to comply with numerous terms of the RAB Agreement.

Respondents further demonstrated that they had no intention to adopt the RAB Agreement by reaching out to the Union to negotiate a new agreement in late 1987. Such conduct was certainly inconsistent with any contention that they felt bound by the RAB Agreement.

The Burns decision clearly "counsels utmost restraint in applying an adoption theory, absent *clear and convincing evidence of consent." All State Factors, supra* at 1127 (emphasis added). Since Respondents' conduct in the instant case was ambiguous at best, it would have been inappropriate to find that an adoption occurred. In *Burns,* the Supreme Court cautioned that "holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities." *Burns,* 406 U.S. at 287-288. The Court there explained:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes

impossible and may discourage and inhibit the transfer of capital.

The Petitioner's contention that the Board erred in requiring a clear and convincing standard of proof rather than the preponderance of the evidence standard is without merit. The Petitioner has confused the General Counsel's overall burden of proof with the quality of the evidence needed to sustain that burden. It is settled that the Board may require different evidentiary standards depending on the kind of finding at issue. See, for example, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-709 (1983) (waiver of protected right must be expressed clearly and unmistakably); *Chesapeake & Potomoc Tel. Co. v. NLRB*, 687 F. 2d 633, 636-637 (2d Cir. 1982) (same). Accordingly, to establish the unfair labor practice of refusal to bargain, General Counsel would only have to prove by a preponderance of evidence that Respondents refused to bargain. However, General Counsel would have been required to establish the obligation to bargain by virtue of assumption of the contract by clear and convincing evidence. In any event, under either standard, General Counsel would not have been able to establish assumption.

## POINT II

## THE BOARD WAS NOT REQUIRED TO APPLY COLLATERAL ESTOPPEL TO THE STATE COURT DECISION

The Petitioner contends that the decision of New York State Supreme Court that Field Bridge and Rachel Bridge intended to assume the RAB Agreement with the

Union when they purchased the properties in July, 1987, should be given a *collateral estoppel* effect.

The Board has held it is not precluded from "litigating and ruling on the same and other related issues" because it was not a party to the prior state court actions. *Donna-Lee Sportswear Co., Inc.*, 281 NLRB 719, 719 n.2 (1986), enforcement denied, 836 F.2d 31 (1st Cir. 1987). As stated by the Board in *Allbritton Communications, Inc.*, 271 NLRB 201, 202 n.4 (1984), enforced, 766 F.2d 812 (3d Cir. 1985):

> The general rule is that the Government, not having been a party to the prior litigation, is not barred from litigating an issue involving enforcement of Federal law which a private plaintiff has litigated unsuccessfully.

(citations omitted). Accord *Newport News Shipbuilding and Dry Dock Co.*, 253 NLRB 721, 726-29 (1980), enforced, 663 F.2d 488 (4th Cir. 1981).

Section 1 of the National Labor Relations Act provides that its purpose is to eliminate industrial strife which impairs the free flow of commerce. In the instant case, the Union caused strikes to be conducted against Respondents on the express basis that there were no collective bargaining agreements in existence. When the strikes failed, the Union claimed that agreements had in fact been in existence. The Board has an interest in protecting the public interest by discouraging labor organizations from engaging in such tactics. In such circumstances in the future, it is less likely that Local 32B-32J will conduct a strike claiming there is no contract believing it can rely on its "fall-back" position that there

is a contract. This protects the public from unnecessary strikes pursuant to the purpose of the Act.

Under New York law, a valid final judgment on the merits precludes relitigation of an issue of fact or law only where it is established: (1) that there is an "identity of an issue" that was necessarily decided in the earlier proceeding with one that is decisive in the second action; and (2) the opposing party has not been denied a "full and fair opportunity" to contest the issue now said to be controlling. *Staatsburg Water Co. v. Staatsburg Fire District,* 72 N.Y.2d 147, 531 N.Y.S.2d 876 (1988); *Halyalkar v. Board of Regents,* 72 N.Y.2d 261, 532 N.Y.S.2d 85 (1988). Both of these tests must be satisfied in order to permit the judgment in the first action to preclude litigation of an issue in the second action. The Union has failed to establish that these tests have been met.

The claims in the State Court proceedings involved the Union's charge that Respondents were responsible *to arbitrate* alleged violations of the collective bargaining agreement *committed by the prior employer* and occurring *before* the July 1, 1987 transfer date. This proceeding, on the other hand, involves the claim by the Union that Respondents are *responsible for* alleged statutory violations *committed by Respondents themselves after* the transfer of the properties and *after* the collective bargaining agreement expired. There is no "identity of interest" between the cases to warrant the preclusion urged by the Union.

The evidence necessary to decide the unfair labor practice issues is different than the evidence relied on in the State Court proceedings. There, Justices Gammerman and Moskowitz primarily considered the written real

estate contract and the practices of the real estate industry to find an intent to assume the contract. They did not consider the post-transfer conduct of the Union and Respondents to support their determinations. In this proceeding, it was precisely these post-transfer acts which proved that the Union acquiesced in the position that there was no assumption of the agreements.

The Petitioner's argument overlooks the fact that, in addition to handling unfair labor practice complaints, the Board is responsible for resolving representational issues, including identification of an appropriate bargaining unit and certification of an exclusive bargaining agent. The district courts, on the other hand, are vested with limited jurisdiction pursuant to Section 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. Section 185(a)). *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Facetglas, Inc.*, 845 F.2d 1250, 1251-52 (4th Cir. 1988).

In the instant proceeding, the Board was called upon to decide whether or not the Union was the exclusive bargaining representative for the mixed-guard unit described in the RAB Agreement. There is no doubt that recognitional and representational issues such as this one, involving mixed-guard units and unions under Section 9(b)(3) of the Act, are within the exclusive jurisdiction of the Board and not within a court's jurisdiction to decide. See *Teamsters, Local 682 v. Bussen Quarries, Inc.*, 849 F.2d 1123 (8th Cir. 1988).

In sum, there is nothing in the decisions of the New York State Supreme Court which barred or precluded the Board from issuing its decision herein.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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